IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re PRO PAGE PARTNERS, LLC, Debtor.	No. 00-22856 Chapter 7
MARY FOIL RUSSELL, Trustee, Plaintiff, vs. PEOPLE'S COMMUNITY BANK, Defendant.	Adv. Pro. No. 01-2037

M E M O R A N D U M

APPEARANCES:

MARK S. DESSAUER, ESQ.
HUNTER, SMITH & DAVIS, LLP
Post Office Box 3740
Kingsport, Tennessee 37664
Attorneys for Mary Foil Russell, Trustee

RICK J. BEARFIELD, ESQ.
JASON W. BLACKBURN, ESQ.
BEARFIELD & MCCLELLAN
Post Office Box 4210
Johnson City, Tennessee 37602
Attorneys for People's Community Bank

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the chapter 7 trustee seeks to avoid and recover as preferential transfers and fraudulent conveyances pursuant to 11 U.S.C. §§ 544(b), 547, and 548 certain transfers from the debtor to the defendant. Presently before the court is the defendant's motion for judgment on the pleadings with respect to § 547 and for summary judgment regarding §§ 544(b) and 548. Also before the court is the trustee's motion for summary judgment as to § 544(b). For the reasons discussed below, the motion for judgment on the pleadings will be granted and the summary judgment motions granted in part and denied in part. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(F) and (H).

I.

The debtor Pro Page Partners, LLC ("Pro Page") commenced business as a paging company in January of 1997. In connection with the startup of its business, Pro Page obtained two loans from the People's Community Bank (the "Bank") in the amounts of $90,000 and $200,000 on January 24, 1997, and a third loan in the amount of $125,000 on June 6, 1997. All three loans were secured by assets belonging to various members of Pro Page and their families, and all of the loans were guaranteed by Pro Page's members, including Mark Halvorsen, Joe Potter, and

Carlton A. Jones III (collectively, the "Members").

Thereafter, beginning in 1998, the Bank made four loans directly to the Members, secured by assets of the Members. The Members' loans were in the amount of $70,500, $402,000, $20,200 and $13,850 and were incurred on April 3, 1998, May 29, 1998, July 13, 1998, and January 31, 2000, respectively. Pro Page was neither an obligor nor a guarantor of any of these four loans, and none of its assets were pledged as security.

It is undisputed that the $402,000 loan to the Members was utilized to pay off the balance owed by Pro Page on the three loans which it had obtained from the Bank in 1997. As a result of this payment on May 29, 1998, Pro Page was no longer indebted to the Bank. Nonetheless, Pro Page thereafter made numerous payments to the Bank, which payments were applied to the Members' obligations to the Bank. From June 26, 1998, to October 23, 2000, Pro Page made 16 payments totaling $62,791.24 to the Bank on the Members' $70,500 loan; 17 payments totaling $102,621.90 on the $402,000 loan; 15 payments totaling $7,698.55 on the $20,200 loan; and 3 payments totaling $1,191.11 on the $13,850 loan.

Pro Page filed for bankruptcy relief under chapter 11 on October 23, 2000, and commenced this adversary proceeding against the Bank on July 3, 2001. On September 4, 2001, the

chapter 11 case was converted to chapter 7. Thereafter, Mary Foil Russell was appointed as trustee and substituted for party plaintiff in this action by order entered December 12, 2001.

In the original complaint, Pro Page sought to avoid and recover as preferential transfers under §§ 547 and 550 the payments which it made to the Bank on the Members' $70,500 note during the ninety days preceding the bankruptcy filing. In the first amended complaint, Pro Page additionally sought the avoidance and recovery of the payments it made to the Bank on the Members' obligations during the one-year period before the bankruptcy filing as fraudulent transfers under § 548 based on the contention that it was insolvent on the date each transfer was made and received less than a reasonably equivalent value in exchange. In the second amended complaint, Pro Page avers that all of the payments which it made on the Members' obligations to the Bank constitute fraudulent conveyances under the Tennessee Uniform Fraudulent Conveyance Act, TENN. CODE ANN. § 66-3-301, *et seq.*, avoidable under 11 U.S.C. § 544(b). As such, the trustee seeks a judgment against the Bank in the amount of $174,302.80 plus prejudgment interest from the dates of the conveyances.

II.

The court turns first to the Bank's motion for judgment on

the pleadings which pertains only to the trustee's claim for recovery under § 547 of the Bankruptcy Code. As its basis for the motion, the Bank alleges that "Plaintiff has failed to plead the required statutory elements to prevail under 11 U.S.C. § 547 and has instead plead facts that are contrary to the requirements of 11 U.S.C. § 547." More specifically, the Bank argues that the trustee has failed to make the necessary allegations under § 547 that the transfers were made to or for the benefit of a creditor and on account of an antecedent debt owed by the debtor. The Bank asserts that, instead, the complaint states that the Bank is not a creditor of Pro Page and that the transfers were made because of an antecedent debt of the Members rather than of Pro Page.

In her response to the motion filed June 2, 2003, the trustee expressly concedes that the Bank is entitled to a dismissal of the § 547(b) claim. Accordingly, the Bank's motion for judgment on the pleadings will be granted.

III.

The court next turns to the parties' motions for summary judgment regarding the alleged fraudulent conveyances. The trustee alleges that she is entitled to summary judgment on her claim that all of the specified transfers from Pro Page to the

Bank are avoidable and recoverable under § 544(b) of the Bankruptcy Code. This strong-arm provision of the Code "allows the trustee to 'step into the shoes' of a creditor in order to nullify transfers voidable under state fraudulent conveyance acts for the benefit of all creditors." *See Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 698 n.3 (6th Cir. 1999). The trustee contends that Message Express Paging Company was a creditor holding an allowed unsecured claim at the time of the transfers and that she can exercise Message Express' avoiding powers under Tennessee's version of the Uniform Fraudulent Conveyance Act ("UFCA"), as set forth in TENN. CODE ANN. § 66-3-101, *et seq*.[1] Specifically, TENN. CODE ANN. § 66-3-305 provides that:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to such person's actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.

In connection with her summary judgment motion, the trustee has tendered evidence which she contends establishes that Pro Page was insolvent at the time of the transfers. In addition, the trustee asserts that the transfers were made without fair

---

[1]Effective July 1, 2003, the Tennessee legislature repealed the Uniform Fraudulent Conveyance Act found at chapter 3 of title 66 and replaced it with the Uniform Fraudulent Transfer Act. The citations herein are to the old act since this action was commenced prior to its repeal.

consideration because Pro Page was not liable on the debts and received no economic benefit in return.

In its response to the trustee's summary judgment motion and in its own summary judgment motion, the Bank does not challenge the contention that Message Express was an unsecured creditor and that the trustee can exercise its avoidance powers under § 544(b). Nor does it question the assertion that the transfers to it were made while Pro Page was insolvent. Instead, the only issue raised by the Bank is whether the transfers were made without fair consideration. The Bank contends that the Pro Page received value for its transfers to the Bank "in two distinct ways at two different times: 1) Pro Page reduced its debt to the Members with each transfer to the bank on the date of the transfer and 2) Pro Page received the benefit of the proceeds of the Members' Notes on the dates that the Members took out loans with the Bank and contributed the proceeds to Pro Page." Based on this assertion, the Bank contends that not only is the trustee not entitled to summary judgment, but that summary judgment on the trustee's § 544(b) claim should be rendered in its favor. Because the trustee's § 548 fraudulent conveyance action similarly requires a showing that the debtor received "less than a reasonably equivalent value in exchange for such transfer," the Bank maintains that it is entitled to summary

judgment on this claim as well.

In response to the Bank's arguments on the fair consideration issue, the trustee states that other than with regard to the $402,000 loan to the Members, there is no evidence in the record that the proceeds of the other loans to the Members were contributed to Pro Page. The trustee also asserts that there is no evidence in the record that supports the Bank's contention that when Pro Page made payments to the Bank, it was reducing its own indebtedness to the Members. With respect to the $402,000 loan, while the trustee admits that it was used to repay the prior obligations of Pro Page, the trustee contends that in the absence of evidence to the contrary, the Members' utilization of the loan proceeds on Pro Page's behalf was merely a capital contribution rather than a loan and is thus legally insufficient to establish fair consideration for subsequent payments by Pro Page to the Bank.

Lastly, in regard to the subject of fair consideration, the trustee observes that the definition of fair consideration under Tennessee law requires not only that there be an exchange of fair consideration but also that the exchange be made in good faith. *See* TENN. CODE ANN. § 66-3-304(1). The trustee states that the good faith requirement has been equated with the lack of knowledge of insolvency and that because the Bank knew or had

reason to know of Pro Page's insolvency at the time of Pro Page's payments to it, there are genuine issues of material fact which preclude summary judgment in favor of the Bank on the fair consideration issue. Each of these issues will be addressed in turn.

Under § 548 of the Bankruptcy Code,[2] the trustee may avoid as constructively fraudulent any property transfer made by the debtor within one year before the filing of the petition if the debtor was insolvent on the date of the transfer and "received less than a reasonably equivalent value in exchange for the transfer." *Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 770 (6th Cir. 1995). For fraudulent transfer purposes, "value" is defined by the Bankruptcy Code as "property, or satisfaction or securing of a present or antecedent debt of the debtor...." 11 U.S.C. § 548(d)(2)(A). As the party asserting

---

[2]11 U.S.C. § 548(a)(1) provides in pertinent part the following:

> The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> ....
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation ....

the avoidability of the transfer, the trustee has the burden of proof. *See Bailey v. Commerce Federal Savings & Loan Assn. (In re Butcher)*, 51 B.R. 61, 65 (Bankr. E.D. Tenn. 1985).

As a general rule, a debtor does not receive value within the meaning of § 548 when it pays the debt of a third party. *See, e.g., Leonard v. Mountainwest Fin. Corp. (In re Whaley)*, 229 B.R. 767, 775 (Bankr. D. Minn. 1999)(Payment made solely for benefit of third party, such as payment to satisfy third party's debt, does not furnish "reasonably equivalent value" for fraudulent transfer avoidance purposes.). However, the courts have recognized an exception to this general rule if the debtor received some indirect, economic benefit from the payments. The most-ofted cited case in this regard is *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981), wherein the court stated:

> [A] debtor may sometimes receive "fair" consideration even though the consideration given for his property or obligation goes initially to a third person.... [A]lthough "transfers solely for the benefit of third parties do not furnish fair consideration" ..., the transaction's benefit to the debtor "need not be direct; it may come indirectly through benefit to a third person." [Citations omitted.] If the consideration given to the third person has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved, and [the statute] has been satisfied—provided of course, that the value of the benefit received by the debtor approximates the

> value of the property or obligation he has given up. For example, fair consideration has been found for an individual debtor's repayment of loans made to a corporation, where the corporation had served merely as a conduit for transferring the loan proceeds to him. [Citations omitted.] Similarly, fair consideration will often exist for a novation, where the debtor's discharge of a third person's debt also discharges his own debt to that third person .... In each of these situations, the net effect of the transaction on the debtor's estate is demonstrably insignificant, for he has received, albeit indirectly, either an asset or the discharge of a debt worth approximately as much as the property he has given up or the obligation he has incurred.... [T]he decisions [cited] turn on the statutory purpose of conserving the debtor's estate for the benefit of creditors.

Id. at 991-92 (discussing § 67 of the former Bankruptcy Act, the predecessor to § 548 of the present Bankruptcy Code).

Utilizing the principles announced in *Rubin*, the Fourth Circuit Court of Appeals concluded in *Harman v. First American Bank of Maryland (In re Jeffrey Bigleow Design Group, Inc.)*, 956 F.2d 479 (4th Cir. 1992), that no fraudulent transfer occurred where the owners of the debtor obtained a loan from the defendant and then in turn loaned the money to the debtor, which repaid the defendant directly. As observed by the court:

> Other creditors should not be able to complain when the bankruptcy estate has received all of the money which it is obligated to repay. Otherwise, the creditors would receive not only the benefit of the money received from the draws on the lines of credit, but also the windfall of avoided transfers designed to repay the draws. In essence, the estate, and hence the unsecured creditors, would be paid twice.

Id. at 485.

Similarly, in *Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 70 B.R. 928 (Bankr. E.D. Tenn. 1987), Bankruptcy Judge Ralph H. Kelley observed that "the courts have long recognized that a debtor can pay its debt to X by paying X's debt to Y. The debtor's payments to Y must reduce the debtor's legitimate debt to X." *Id.* at 934. *See also Hall v. Arthur Young & Co. (In re Computer Universe, Inc*.), 58 B.R. 28, 30 (Bankr. M.D. Fla. 1986)("[W]here interest payments were made by the debtor on a loan to a third party, which loan proceeds were then reloaned to the debtor, the debtor has received reasonably equivalent value.").

Thus, under the facts of the present case, if after borrowing the monies from the Bank, the Members had in turn loaned the money to Pro Page, such that in paying the Bank Pro Page was reducing its own obligation to the Members, Pro Page would have received an indirect benefit for fraudulent conveyance purposes. While the Bank contends in its motion for summary judgment that this scenario occurred in this case, the trustee correctly observes that no evidence has been offered in support of these facts. Although it appears undisputed that the proceeds from the $402,000 loan to the Members were utilized for the benefit of Pro Page, there is nothing in the record which

would indicate that these loan proceeds or the proceeds of any of the three other loans were actually loaned to Pro Page, such that upon making payment to the Bank Pro Page was reducing its own indebtedness to the Members with respect to each of the various loans.

An alternative argument by the Bank is that regardless of whether the Members loaned the monies to Pro Page, by paying the debts of the Members, Pro Page received value in the form of an equitable right of offset against other unrelated debts which it owed to the Members. The Bank additionally contends that value was received because the Members either gave the proceeds to Pro Page or utilized the loan proceeds on Pro Page's behalf irrespective of whether the proceeds were actually loaned to Pro Page.

Addressing the latter contention first, this court notes that in the *C-L Cartage Co*. case cited above, Judge Kelley concluded that the debtor's payments on behalf of another met the criteria of the indirect benefit cases and thus were not fraudulent transfers based on the express finding that the debtor had obtained a loan from its shareholder which it was repaying by paying the shareholder's debt. *In re C-L Cartage Co.*, 70 B.R. at 934. After reaching this conclusion, Judge Kelley observed that:

> It may not make a difference whether the debtor corporation actually owes a debt to the stockholder so long as the money or property that gave rise to the stockholder's debt was in fact received by the corporation. [Citations omitted]. The court, however, need not decide since it has concluded that the debtor owed [its stockholder] a debt.

Id. at 935.

Courts which have directly considered this issue have found reasonably equivalent value if the debtor received the benefits of the loan, even if the debtor had no legal obligation to repay the monies. In *Beemer v. Walter E. Heller & Co. (In re Holly Hill Medical Center, Inc.)*, 44 B.R. 253 (Bankr. M.D. Fla. 1984), an entity owned by a shareholder of the debtor borrowed money from a third party to fund the operations of the debtor. Thereafter, the debtor made the interest payments on the obligation even though the debtor was not liable on the debt and had pledged no collateral. Because the debtor had received the loan proceeds, the bankruptcy court rejected, under the authority of *Rubin* and its indirect benefit analysis, the bankruptcy trustee's assertion that the interest payments made by the debtor were avoidable as fraudulent transfers. *Id.* at 254.

Similarly, in *Butz v. Sohigro Service Co. (Matter of Evans Potato Co.)*, 44 B.R. 191 (Bankr. S.D. Ohio 1984), the defendant sold on credit certain goods to an individual although the goods

were picked up and used by a corporation, which subsequently paid the defendant for the goods. After the corporation filed for bankruptcy relief, the trustee brought suit under § 548 to recover the payments as constructively fraudulent. The court concluded that because the debtor had exclusive use of the goods sold, it had received reasonably equivalent value in exchange for its payments. *Id.* at 194.

In the more recent case of *Crews v. First Union National Bank of Florida, N.A. (In re Michelle's Hallmark Cards & Gifts, Inc.)*, 219 B.R. 316 (Bankr. M.D. Fla. 1998), the debtor made payments on a loan incurred by its shareholders. Citing the *Holly Hill Medical Center* and *Matter of Evans Potato* decisions, the bankruptcy court found that the debtor had received reasonably equivalent value in exchange for its payments because it had exclusive use of the property purchased by the shareholders with the loan proceeds. *Id.* at 322-23. *See also Grant v. Sun Bank/North Cent. Fla. (In re Thurman Constr., Inc.)*, 189 B.R. 1004, 1015 (Bankr. M.D. Fla. 1995)(debtor received reasonably equivalent value under § 548 for payments it made to defendant on loan to principals of debtor where purpose of the loan was to obtain working capital for debtor and debtor received money directly and utilized funds to pay operating expenses); *Nordberg v. Republic Nat'l Bank of Miami (In re Chase*

& Sanborn Corp.), 51 B.R. 739, 740 (Bankr. S.D. Fla. 1985)(Where the transfer is "from a corporate debtor in bankruptcy to a defendant bank in payment of the personal note of the debtor's dominant stockholder, where the benefit of payment inured immediately to the corporate debtor," the transfer is not fraudulent.); 9C Am. Jur. 2d *Bankruptcy* 2061 (2002) ("[V]alue [under § 548] may be received by a debtor who transfers property in payment of a third party's debt where the debtor receives some benefit from the payment, such as the goods, services, or use of money for which the debtor has paid.").

Applying these decisions to the present case, the court concludes that Pro Page would have received reasonably equivalent value in exchange for its payments to the Bank on the Members' loan obligations if the proceeds from these loans were distributed to Pro Page or utilized on its behalf. From the court's examination, it appears that two of the four loans in question, those in the amounts of $402,000 and $13,850, meet this criteria. It is undisputed that the proceeds from the $402,000 loan were utilized to pay off Pro Page's outstanding obligations to the Bank.[3] The fact that Pro Page made the

[3]Of the $402,000 in loan proceeds, $353,152.51 was used to pay off Pro Page's three loans from the Bank and $3,549 went to loan closing costs and fees. The remainder in the amount of $45,298.49 was paid by the Bank to the Members and no evidence (continued...)

transfers to the Bank after it had received the benefit of the loan does not nullify the benefit received by Pro Page. There is no requirement that the benefit be received contemporaneously or subsequent to the transfers—only that the value be received in exchange, an element that has been met in this case.

Similarly, the $13,850 loan made to the Members on January 31, 2000, was for the benefit of Pro Page. The Bank's president, Michael T. Christian, testified in his deposition that Pro Page had written a check to the Bank on a First Tennessee Bank account in the amount of $13,700 which was dishonored for nonsufficient funds. The loan to the Members in the amount of $13,850 was made to cover this check. The trustee observes that Pro Page's original check to the Bank was for the purpose of paying the Members' debts to the Bank and therefore argues that Pro Page received no benefit from the loan incurred to cover the check. However, as Mr. Christian observed in his deposition, as the maker of the check, Pro Page was primarily liable to the payee Bank after the check was presented for payment and dishonored. *See* TENN. CODE ANN. §§ 47-3-310 and 414. The Members satisfied Pro Page's liability to the Bank arising

---

[3](...continued)
was offered as to its ultimate use. Because the amount utilized on Pro Page's behalf, $353,152.51, is greater than the total payments made by Pro Page on this loan, $102,621.90, Pro Page received reasonably equivalent value.

out of the dishonored check by borrowing from the Bank and utilizing the proceeds to cover the check. Accordingly, Pro Page received reasonably equivalent value when it made the payments to the Bank on a debt incurred on its behalf. The Bank will be granted summary judgment in its favor with respect to the trustee's action under § 548 for transfers related to the $402,000 and $13,850 loans.

As to the payments on the other two loans in the amounts of $70,500 and $20,200, there is nothing in the record which establishes that the proceeds from these loans were utilized on Pro Page's behalf. Exhibit 17 to the deposition of Larry E. Cate, a vice president and commercial loan officer with the Bank, is the credit memorandum for the $70,500 loan made to the Members on April 3, 1998. The memo recites that the purpose of the loan is to "Establish line of credit for short term working capital needs, including payroll and various expenses." The promissory note itself, Exhibit 21, equivocally states that the purpose is "business: BUSINESS USE." The promissory note for the $20,200 loan, Exhibit 46, recites that the purpose of the loan is "BUSINESS: WORKING CAPITAL." Although the credit memorandum for this loan, Exhibit 49, indicates that the purpose of the loan is "working capital for Pro Page," there is no evidence before the court that the loan proceeds were in fact

used for this purpose.

In one of its reply memoranda, the Bank asserts that because it is undisputed that Pro Page received the benefit of the $402,000 loan and because the proceeds from this loan were greater than all of the payments made by Pro Page on the Members' behalf, Pro Page received "reasonably equivalent value" within the meaning of § 548(a). Although not expressed as such, the Bank appears to be asserting a type of "net result" theory, reminiscent of the net result exception to preferences under the old Bankruptcy Act. *See* 5 COLLIER ON BANKRUPTCY ¶ 547.04[4][d] (15th ed. rev. 2003). The Bank cites no authority for this defense, and the court has been unable to locate any. A close examination of the elements of § 548(a)(1)(B) demonstrates the weakness of the Bank's argument. Not only must a debtor receive "reasonably equivalent value" in order for a transfer to be immune from avoidance, it must also, as required by the precise language of the statute, be received "in exchange" for the transfer. *See* 11 U.S.C. § 548(a)(1)(B)(i) ("the debtor ... received less than a reasonably equivalent value in exchange for such transfer or obligation"). Absent proof to the contrary, it cannot be said that the proceeds from the $402,000 loan were received in exchange of anything other than payments by Pro Page on this particular loan. *See Christians v. Crystal Evangelical*

Free Church (In re Young), 82 F.3d 1407, 1416 (8th Cir. 1996) (Because the debtors did not receive church services "in exchange for" their contributions, the contributions were avoidable transfers and were recoverable by the trustee under 11 U.S.C. § 548(a).); *Morris v. Midway Southern Baptist Church (In re Newman)*, 203 B.R. 468, 472 (D. Kan. 1996) (For fraudulent transfer purposes, benefits that chapter 7 debtors received from their church were not given "in exchange for" debtors' contributions to church.).

The Bank's last line of defense in this regard is the setoff argument, that by paying the Members' obligations to the Bank, Pro Page received a right of setoff against any debts which it owed the Members. There is authority for this proposition. Under the facts of an unpublished opinion by the Sixth Circuit Court of Appeals, the debtor granted a lien on its real property in order to secure loans made to the shareholders of its parent corporation for the benefit of the parent. *See CLC Corp. v. Citizens Bank of Cookeville, Tenn. (In re CLC Corp.)*, 1987 WL 38995, *1-2 (6th Cir. Nov. 19, 1987). After the debtor filed for chapter 11 relief, it filed suit to set aside the deed of trust as a constructively fraudulent transfer under § 548, claiming that it was insolvent at the time and did not receive value because it did not receive the loan proceeds. The

bankruptcy court concluded that although the debtor was indebted to its parent corporation at the time it executed the deed of trust, the debtor had not directly or indirectly benefited from the conveyance because there was "no evidence of a novation of any obligation of CLC Corporation by virtue of the transfer." *Id.* at *2. Upon appeal, the district court reversed, concluding that the parent had incurred a debt to the debtor CLC when CLC provided collateral for the line of credit. Thus, "CLC did benefit economically from the transfer by receiving the equitable right to set off its debt to [its parent] ... against [its parent's] debt to it for the collateral." *Id.* The Sixth Circuit affirmed the district court and stated:

> Although payment or assumption of a third party's debt by a bankruptcy debtor usually is deemed to be a fraudulent conveyance [citation omitted], courts can look beyond the face of a transfer to determine if the debtor benefited from the transfer in a way that is not apparent on the face of the transaction. *See Rubin v. Manufacturers Hanover Trust,* 661 F.2d 979 (2d Cir. 1981); *accord McNellis v. Raymond*, 287 F. Supp. 232, 238-39 (N.D.N.Y. 1968), *aff'd in relevant part*, 420 F.2d 51 (2d Cir. 1970); *Mayo v. Pioneer Bank & Trust Co.*, 270 F.2d 823 (5th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960).
>
> ....
>
> The bankruptcy court erred by failing to recognize that as the true beneficiary of the line of credit, [the parent] was indebted to CLC for securing that line of credit. The court should have concluded that because CLC was insolvent on the day it executed the deed of trust, CLC had the right to claim an immediate

> set off of its debt to [its parent] for the office properties against [its parent's] newly created debt to CLC for the collateral. *See Nashville Trust Co. v. Fourth National Bank*, 18 S.W. 822 (1892); 80 C.J.S. *Set-off and Counterclaim* § 29. Thus, the value CLC received in return for its execution of the deed was the satisfaction of its antecedent debt to [its parent] for the office properties, and consequently, the deed of trust was not a fraudulent conveyance.

Id. at *3-4.

This court recognizes that an unpublished decision of the Sixth Circuit Court of Appeals is not binding precedent. *See United States v. Ables*, 167 F.3d 1021, 1031 (6th Cir.), *cert. denied*, 527 U.S. 1027 ("[A]n unpublished opinion has no precedential force."). Nonetheless, "unpublished decisions of the Sixth Circuit may be cited if persuasive and no published decisions will serve as well." *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 201 n.2 (B.A.P. 6th Cir. 1998). *See also In re Braddy*, 195 B.R. 365, 370 (Bankr. E.D. Mich. 1996) (collecting cases) ("[A]lthough the Court of Appeals does recognize that its unpublished decisions are not binding precedent in the same sense as published decisions, the court does cite an unpublished decision when there is no published decision on point and the reasoning of the unpublished decision is found persuasive.").

The Sixth Circuit's holding in *CLC Corp.* is consistent with the analysis of the other indirect benefit cases which "are bottomed upon the ultimate impact to the debtor's creditors."

In re Chase & Sanborn Corp., 51 B.R. at 740. *See also Heritage Bank Tinley Park v. Steinberg (In re Grabill Corp.)*, 121 B.R. 983, 995 (Bankr. N.D. Ill. 1990)("The test is the measure of the economic benefit that accrues to the debtor.")(citing *Rubin*, 661 F.2d at 993); *In re Computer Universe, Inc.*, 58 B.R. at 32 ("Prevention of depletion of the estate is the common thread that runs through Sections 547 and 548.").

Furthermore, the basis of the *CLC Corp.* ruling, that a setoff right may constitute value, was the implied reasoning for the result reached by the court in an adversary proceeding arising out of this district in the infamous Jake Butcher bankruptcy case. *See Bailey v. Commerce Federal Savings & Loan Assn. (In re Butcher)*, 51 B.R. 61 (Bankr. E.D. Tenn. 1985). In that proceeding, the chapter 7 trustee asserted that the debtor's conveyance of mortgages on two condominium units to secure an $800,000 loan by the defendant to a third party was a fraudulent transfer under the constructive fraud provisions of § 548(a) because the debtor had received no benefit from the conveyance. Although it was undisputed that the loan proceeds went to the third party rather than the debtor, the bankruptcy court concluded, based on *Rubin*, that the debtor had received reasonably equivalent value in exchange for the mortgages because the debtor had a preexisting debt to the third party in

the amount of $750,000 and the mortgage transaction ultimately operated to discharge the debtor's own debt. *Id.* at 65. The *Butcher* decision, like that in *CLC Corp.,* illustrates the principle in *Grabill Corp.* that "any economic benefits derived from the transaction may be considered" as long as "the benefit received [is] fairly concrete." *In re Grabill Corp*., 121 B.R. at 992-95. Based on all of the foregoing, this court is persuaded that a setoff of debt is a concrete, economic value which may constitute value as defined by § 548(d)(2)(A).

As evidence of debts owed by Pro Page to the Members, the Bank has submitted what purports to be Pro Page's accounts payable records from May 31, 1998, through October 31, 2000, the period during which Pro Page made the allegedly fraudulent transfers to the Bank. These records indicate that Pro Page's obligations to the Members increased during this time period from a low of $100,122.72 to $378,964. The Bank asserts in its latest memorandum that "[w]hile these documents do not reflect a reduction in the amount of the loan for corresponding payments by Pro Page to the Bank, Pro Page would have a right of set off for any payments made." In response to the submission of these documents, the trustee asserts that the evidence tendered by the Bank may not be considered by the court because it has not been properly authenticated and constitutes inadmissible hearsay.

The Bank counters that the documents were produced from a CD-ROM provided to it by the trustee, that it only produced the documents from the CD-ROM as a convenience to the court and counsel, and that the court can reproduce these documents from the underlying data.

The law is clear that:

> Unauthenticated documents, once challenged, cannot be considered by a court in determining a summary judgment motion. In order for documents not yet part of the court record to be considered by a court in support of or in opposition to a summary judgment motion they must meet a two-prong test: (1) the document must be attached to and authenticated by an affidavit which conforms to Rule 56(e); and (2) the affiant must be a competent witness through whom the document can be received into evidence.
>
> Documentary evidence for which a proper foundation has not been laid cannot support a summary judgment motion, even if the documents in question are highly probative of a central and essential issue in the case.

Harris v. Beneficial Okla., Inc. (In re Harris), 209 B.R. 990, 996 (B.A.P. 9th Cir. 1997)(quoting 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶s 56.10[4][c][i] & 56.14 [2][c] (3d ed. 1997) and citing, *inter alia*, *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 89 (6th Cir. 1993)("Documents that are not part of the 'pleading, depositions, answers to interrogatories, and admissions on file,' can only enter the record as attachments to an appropriate affidavit to constitute a basis

for summary judgment.")).

Contrary to the Bank's argument, the court knows of no exception to the authentication requirement for evidence produced by the opposing party. The Bank's comment may have been directed at the trustee's argument that the documents constitute hearsay and may be an assertion that the evidence falls within the business records exception of Fed. R. Evid. 803(6). However, "[t]he mere presence of a document in the files of a business entity does not qualify that document as a record of regularly conducted activity; there must be proof which satisfies the foundational elements of Rule 803(6)." 29A AM. JUR. 2D *Evidence* § 1310 (2003). *See also Sicherman v. Diamoncut (In re Sol Bergman Estate Jewelers, Inc.)*, 225 B.R. 896, 900-01 (B.A.P. 6th Cir. 1998)(both exhibits and underlying business records of the debtor constitute hearsay unless they qualify under an exception; debtor's computer records admitted into evidence where witness was "familiar with the company's recordkeeping practices" and her testimony established four requirements for business record hearsay exception). Because the evidence proffered by the Bank has not been authenticated and it has not been established that the evidence is admissible under an exception to the hearsay rule, the evidence may not be considered by the court. The Bank's motion for summary judgment

will be denied as to the trustee's effort to avoid under § 548(a) the payments made by Pro Page within the one-year period of the bankruptcy filing on the Members' loans in the amount of $70,500 and $20,200.

IV.

The court next turns to the parties' motion for summary judgment as to the trustee's § 544(b) cause of action. As noted, this provision authorizes the trustee to nullify transfers avoidable by unsecured creditors under state fraudulent conveyance laws. Under TENN. CODE ANN. § 66-3-305, a conveyance is constructively fraudulent if it is made by one who is insolvent and "without a fair consideration." Because the Bank has not challenged the trustee's assertion that Pro Page was insolvent at the time of the transfers in question, the only issue is whether the transfers were for "fair consideration." TENN. CODE ANN. § 66-3-304 provides, in part, that fair consideration is given "[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied ...." Thus, "[b]y definition, 'fair consideration' is made up of two components, (1) an exchange of a fair equivalent (2) made in good faith." *Still v. Fuller (In re Southwest Equip. Rental,*

Inc.), 1992 WL 684872, *17 (E.D. Tenn. July 9, 1992)(citing *United States v. Tabor Court Realty Corp*., 803 F.2d 1288, 1296-97 (3d Cir. 1986) (construing Pennsylvania's UFCA)).[4] "Consideration that fails to satisfy either component, will not satisfy the definitional test for fair consideration." *Id.*

With respect to the first component, "an exchange of a fair equivalent," several courts, including the Sixth Circuit Court of Appeals, have noted that this requirement under the Uniform Fraudulent Conveyance Act as adopted by the various states is substantially similar to 11 U.S.C. § 548's "reasonably equivalent value" language. *See In re Chomakos*, 69 F.3d at 770 (Although "[t]he Michigan [fraudulent conveyance] statute [which is identical to Tennessee's] does not have a time limit corresponding to that in the Bankruptcy Code, the two provisions are substantially the same otherwise."); *Moody v. Sec. Pac. Bus. Credit, Inc*., 127 B.R. 958, 964 (W.D. Penn. 1991)("[T]he

---

[4] The district court in *Southwest Equipment Rental* observed that:

> Pursuant to TENN. CODE ANN. § 66-3-314, the Court must construe and interpret the relevant provisions of the TUFCA consistent with the decisions of other courts in states which have adopted the Uniform Fraudulent Conveyance Act ("UFCA").

In re Southwest Equip. Rental, Inc., 1992 WL 684872, *14. TENN. CODE ANN. § 66-3-314, later renumbered as § 66-3-325, provides that "[t]his part shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."

fraudulent conveyance provisions of the Bankruptcy Code substantially mirror those of the Uniform Fraudulent Conveyance Act."); *Ames Dep't Stores, Inc. v. Wertheim Schroder & Co. (In re Ames Dep't Stores, Inc.)*, 161 B.R. 87, 89 n.1 (Bankr. S.D.N.Y. 1993)("[T]he components of a fraudulent conveyance claim under New York state law ... are almost identical to that of 11 U.S.C. § 548(a)[]...."). *See also In re Southwest Equip. Rental, Inc.*, 1992 WL 684872, *14 ("[B]ecause the fraudulent conveyance provisions of the Bankruptcy Code are modeled after the UFCA, where Tennessee's state courts have not addressed a particular issue, this Court will be guided by authorities interpreting 11 U.S.C. § 548."). As such, the court's various rulings discussed above as to whether reasonably equivalent value has been established will also constitute this court's findings with respect to the first component of fair consideration under Tennessee law.

The second requisite element of fair consideration under Tennessee's fraudulent conveyance statutes is good faith. The trustee alleges that the Bank lacks good faith because it knew or should have known of Pro Page's insolvency at the time of the payments. In support of this argument, the trustee notes that in making the initial loans to Pro Page, which were later repaid by the Members, the Bank had access to information regarding Pro

Page's financial condition. Exhibit 11 to Mr. Cate's deposition, a loan review summary dated July 15, 1997, indicates that based on Pro Page's May 31, 1997 financial statement, Pro Page had assets of $609,344.46 and liabilities of $782,759.61, for a negative net worth of $173,415.15 and a negative net income for the first five months of 1997 of $174,415.15. The conclusion on the summary is that "Company shows positive trends but is not yet profitable. Unable to determine adequacy of collateral. Paying as agreed." In his deposition, Mr. Cate testified that this financial information did not cause him any concern even though the loans were made to the company itself because "a lot of times start-up companies will have negative net worth, and therefore we look to the individuals who guarantee the loan in the event that the company would have problems." Exhibit 16 to Mr. Cate's deposition is Pro Page's December 31, 1997 balance sheet and income statement, which indicates a negative members' equity of $467,973.93 on assets of $921,706.31 and a net loss of $564,533.72 on revenues of $732,933.27. This financial statement was in the Bank's credit files.

The trustee also cites the Bank's May 4, 1998 credit memo, Exhibit 29 to Mr. Cate's deposition, which pertains to the Members' $402,000 loan from the Bank to payoff Pro Page's

outstanding loans. The memo recites that the loan was to be for a period of six months and that "Borrowers plans [sic] on obtaining a venture capital loan from an industry lender later this year." Subsequently on November 18, 1998, the Bank generated a credit memorandum, Exhibit 38 to Mr. Cate's deposition, when the Members requested an extension of the $70,500 and $402,000 loans. The memo states that "[t]he Borrowers are currently trying to obtain alterative financing through another lender or partner who will inject additional capital into the business." Lastly, the trustee references Exhibit 59 to Mr. Christian's deposition, the credit memo generated on January 31, 2000, with respect to the loan to the Members in the amount of $13,850 designed to reimburse the Bank for Pro Page's NSF check. This memo indicates that:

> Borrower Background/Business Review: The borrowers are principals of Pro Page Partners, LLC. This business is in the initial stages of being sold to a 3rd party investor - Wireless Communications Ventures, for $2.5 mm. They expect to receive 10% earnest money by mid February and the balance in March. If it all comes to pass, it will pay-out this new advance and at least part of the other related loans.
>
> Financial Analysis: Pro Page lost $251m in FYE 12/98 and had EBITDA of ($12.2m). They continued to lose money through 1999 and need to follow through on the sale referenced above in order for the LLC members to avoid personal payment of the company's various credit facilities at PCB. They currently have approximately 19m subscribers which is the attraction for an outside purchase.

The trustee contends that construing this evidence in a light most favorable to her raises a genuine issue of material fact regarding the Bank's good faith, thus precluding summary judgment in favor of the Bank.

There are no decisions by Tennessee courts defining "good faith" as utilized in TENN. CODE ANN. § 66-3-304. In *Southwest Equipment Rental,* the district court reviewed cases from other jurisdictions which had considered "good faith" under the UFCA and noted without deciding the issue that "[t]he good faith requirement has been equated with lack of knowledge of insolvency." *In Southwest Equip. Rental, Inc.,* 1992 WL 684872, *17 (citing *Tabor Realty*, 803 F.2d at 196). However, the bankruptcy court in *Webster v. Barbara (In re Otis & Edwards, P.C.)*, 115 B.R. 900 (Bankr. E.D. Mich. 1990), disagreed with this pronouncement in evaluating good faith under the Michigan fraudulent conveyance statute. As stated by that court:

> This court is convinced that more than mere knowledge of the debtor's financial situation or fraudulent intent is required to find a lack of good faith. As commentators have suggested, voiding transfers based on the transferee's mere knowledge under state fraudulent conveyance laws would make the preference laws of Bankruptcy Code § 547 superfluous. Consequently good faith for purposes of this case, will turn on whether the transferee ... aided the debtor in a fraudulent scheme.

Id. at 910. In a footnote, the court observed that a transferee

aids in the debtor's fraudulent scheme when it seeks:

> (1) to secure some advantage for the debtor beyond the mere satisfaction of the debt;
>
> (2) to obtain some advantage for himself beyond that naturally resulting from the payment of the debt; or
>
> (3) to cause some harm to other creditors beyond the sort that would typically result from the postponement of their claims.

Id. at 910 n.51 (citing Note, *Good Faith and Fraudulent Conveyances*, 97 HARV. L. REV. 495, 508 (1983)).

Similarly, the bankruptcy court in *Official Unsecured Creditors Committee v. Oak Park Village L.P. (Matter of Long Development, Inc.)*, 211 B.R. 874, 885-886 (Bankr. W.D. Mich. 1995), stated that in evaluating good faith under the Michigan fraudulent conveyance laws, "[t]he primary orientation on this point is whether the *transferee* knowingly participated in acts or as part of a plan to hinder or defraud creditors." *Id.* at 885-86 (emphasis in original)(citing *In re Chomakos*, 170 B.R. at 593-595). "Thus, absent a showing of fraudulent intent on the part of the [defendants]," lack of good faith had not been established, "even assuming that the [defendants] were aware of the Debtor's alleged insolvency." *Id.* at 886.

In *Eisenberg v. Feiner (In re Ahead by a Length, Inc*.), 100 B.R. 157 (Bankr. S.D.N.Y. 1989), the bankruptcy court observed

that under the UFCA as adopted in New York:

> [A] person seeking to set aside a conveyance upon the basis of lack of "good faith" must prove that one or more of the following factors is lacking: (1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, hinder, delay or defraud others. The term "good faith" does not merely mean the opposite of the phrase "actual intent to defraud." The lack of good faith imports a failure to deal honestly, fairly, and openly.

Id. at 169.

This court finds the reasoning of these courts to be persuasive. The only evidence submitted by the trustee as to the lack of good faith on the part of the Bank is its alleged knowledge of Pro Page's insolvency. There is no indication that the Bank failed to act honestly, fairly, or openly in its dealings with Pro Page or that the Bank took advantage of Pro Page in some fashion. Absent such evidence, the mere fact that the Bank, with knowledge of Pro Page's insolvency, accepted payment from Pro Page is insufficient to establish lack of good faith. Because the trustee has the burden of proof in this regard and has failed to present evidence indicative of lack of good faith, the Bank's motion for summary judgment on this issue will be granted.[5]

---

[5]The trustee incorrectly argues in one of her memoranda of (continued...)

Lastly, the court turns to the issue of whether the trustee is entitled to prejudgment interest from the date of the transfers in the event she proves at trial that Pro Page's payments on the $70,500 and $20,200 loans lacked fair consideration. As the trustee has noted, the Bank does not argue this issue in any of its various memoranda. Under Tennessee law, prejudgment interest may be awarded as a matter of equity, *see* TENN. CODE ANN. § 47-14-123; although "[a]n award of

---

[5](...continued)
law that the Bank has the burden of proof on the good faith issue. To the contrary, because good faith is a component of fair consideration, one of the elements of a fraudulent conveyance, the trustee has the burden of proof. *See Otte v. Landy*, 256 F.2d 112, 114 (6th Cir. 1958)(the bankruptcy trustee has the burden of establishing that the mortgage was a fraudulent conveyance under Michigan law including the required element that the mortgage had not been given for a fair consideration); *In re Southwest Equip. Rental, Inc.*, 1992 WL 684872, *17 (the trustee has the burden of proof on the issue of lack of fair consideration because it is a material element under the Tennessee fraudulent conveyance statutes); *United Nat'l Real Estate, Inc. v. Thompson*, 941 S.W.2d 58, 62 (Tenn. App. 1996)("The general rule is that the burden of proof is on the party attacking a conveyance for fraud to establish his case."). Of the two cases cited by the trustee for the proposition that the Bank has the burden of proof on the good faith issue, one involved the Uniform Fraudulent Transfer Act under California law which, contrary to the Uniform Fraudulent Conveyance Act adopted in Tennessee, makes good faith a defense to a fraudulent conveyance action rather than one of the elements. *See Plotkin v. Pamona Valley Imports, Inc. (In re Cohen)*, 199 B.R. 709, 718 (B.A.P. 9th Cir. 1996). The other cited case, *In re Le Cafe Creme, Ltd.*, 244 B.R. 221, 240-41 (Bankr. S.D.N.Y. 2000), dealt with New York's actual fraud statute rather than its constructive fraud provision and thus is inapposite.

prejudgment interest is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion." *Brandt v. Bib Enters., Ltd.*, 986 S.W.2d 586, 595 (Tenn. App. 1998).

The Tenth Circuit Court of Appeals has observed that the Bankruptcy Code does not specify whether the bankruptcy court may award prejudgment interest to a trustee prevailing under the avoidance statutes. *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1566 (10th Cir. 1993). The court stated that:

> In the absence of a statutory provision to the contrary, prejudgment interest may generally be awarded if 1) the award of prejudgment interest would serve to compensate the injured party, and 2) the award of prejudgment interest is otherwise equitable. [Citations omitted.] In bankruptcy proceedings, the courts have traditionally awarded prejudgment interest to a trustee who successfully avoids a preferential or fraudulent transfer from the time demand is made or an adversary proceeding is instituted unless the amount of the contested payment was undetermined prior to the bankruptcy court's judgment.

Id. *See also Murray v. La. State Univ. Found. (In re Zohdi)*, 234 B.R. 371, 385 (Bankr. M.D. La. 1999); *Floyd v. Dunson (In re Ramirez Rodriguez)*, 209 B.R. 424, 434 (Bankr. S.D. Tex. 1997); *Pereira v. Private Brands, Inc. (In re Harvard Knitwear, Inc.)*, 193 B.R. 389, 399 (Bankr. E.D.N.Y. 1996)(all awarding prejudgment interest from filing of complaint); *but see Kendall*

v. Sorani (In re Richmond Produce Co.), 151 B.R. 1012, 1022 (Bankr. N.D. Cal. 1993), *aff'd*, 195 B.R. 455 (N.D. Cal. 1996); *Bucki v. Singleton (In re Cardon Realty Corp.),* 146 B.R. 72, 81 (Bankr. W.D.N.Y. 1992) (awarding interest from date of transfer). This court agrees with the trustee that in the event she prevails at trial, an award of prejudgment interest is appropriate and necessary to fully compensate the injured party. However, because this action is based on constructive as opposed to actual fraud, the court concludes that prejudgment interest should run from the time demand was made as opposed to the date of the transfers.

V.

Recapping the court's rulings in this matter, the Bank's motion for judgment on the pleadings will be granted. The Bank will be granted summary judgment with respect to the trustee's efforts under §§ 544(b) and 548 to avoid and recover payments by Pro Page to the Bank on the $402,000 and $13,850 loans and partial summary judgment on the good faith issue as to the other loans. With respect to Pro Page's transfers on the $70,500 and $20,200 loans, the Bank's motion for summary judgment, except on the issue of lack of good faith, will be denied. The trustee will be granted partial summary judgment as to the transfers by

Pro Page on the $70,500 and $20,200 loans as to all issues under §§ 544(b) except the fair equivalent component of fair consideration under TENN. CODE ANN. § 66-3-304 and the date from which prejudgment interest accrues. The court will enter an order in accordance with the foregoing.

FILED: July 3, 2003

BY THE COURT

_____
MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE